The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE TIMES COMPANY,

Plaintiff,

vs.

LEATHERCARE, INC., STEVEN RITT, an individual, and the marital community composed of STEVEN RITT and LAURIE ROSEN-RITT,

Defendants and Third Party Plaintiffs,

vs.

TOUCHSTONE SLU LLC, a Washington limited liability company; TB TS/RELP LLC, a Washington limited liability company; AMERICAN LINEN SUPPLY CO., a Washington corporation; and DOES 1-20,

Third Party Defendants.

Case No.: 2:15-cv-01901-TSZ

SEATTLE TIMES COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ESTABLISHING THE LIABILITY OF STEVEN RITT

NOTE ON MOTION CALENDAR:

July 14, 2017

ORAL ARGUMENT REQUESTED

Plaintiff Seattle Times Company ("Seattle Times" or "Times") moves the Court under Federal Rule of Civil Procedure ("FRCP") 56 for partial summary judgment against Defendants Steven Ritt and the marital community composed of Mr. Ritt and Laurie-Rosen Ritt to establish their liability at a contaminated property located in the South Lake Union area of Seattle (the

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"Property").

INTRODUCTION

This case is brought under two cleanup statutes—the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and Washington's Model Toxics Control Act ("MTCA"), RCW 70.105D. The Times and third party defendants Touchstone SLU LLC and TB TS/RELP LLC (collectively "Touchstone")[1] seek to recover the money they have spent to clean up hazardous wastes disposed in soils and groundwater beneath and adjacent to the Property by Defendant LeatherCare, Inc. ("LeatherCare"). LeatherCare disposed of hazardous wastes—principally the dry cleaning solvent perchloroethylene ("Perc" or "PCE")—during the time period that it leased a portion of the Property from Troy Linen Company ("Troy") and the Times. The Times owned the Property from 1985 until 2011, when it sold the Property to Touchstone.

LeatherCare is a family business that Mr. Ritt's family started and continuously owned since its founding. Mr. Ritt has worked at LeatherCare since the age of fourteen.[2]

Trial is set for November 6, 2017. LeatherCare and the Times have stipulated to the elements of liability under CERCLA and MTCA. Dkt. 41. Unlike LeatherCare, Mr. Ritt has not stipulated to liability and maintains that he and his marital community are not personally responsible for the cleanup costs the Times and Touchstone have incurred. Despite admitting in his deposition that he made virtually every decision relating to LeatherCare's operations while it was located at the Property, including waste disposal decisions, Mr. Ritt maintains that he is not a liable "person" within the meaning of CERCLA and MTCA. This motion is brought to streamline the issues for trial by confirming Ritt's liability. It does not address the extent of Mr. Ritt's liability, which is left for future adjudication.

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[1] TB TS/RELP LLC acquired the Property from Touchstone SLU LLC on March 28, 2013. Both entities have admitted to liability and purport to pursue recovery of cleanup costs in this matter. *See* Dkt. 52.
[2] Declaration of Jeff B. Kray ("Kray Dec.") Ex. 1 at 8:8-9:7.

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I. STATEMENT OF THE ISSUE

There being no genuine issue of material fact, is the Times entitled to an order that Mr. Ritt is liable under CERCLA and MTCA for cleanup costs at the Property because he meets the statutory definition of liability under those two laws: specifically, is he a "person" who formerly "operated" a facility at which there has been a release of hazardous substances and/or a person who "arranged for the disposal" of hazardous waste released at the facility?

II. EVIDENCE RELIED UPON

The Times relies on FRCP 56, the concurrently filed Declarations of Jeff B. Kray, Peter Krasnoff, Peter Jewett, and Bruce Dale and the exhibits thereto, and the pleadings and evidence on file in this case.

III. FACTUAL BACKGROUND

A. Property Overview.

Troy Laundry established a laundry business at the Property in 1927, and constructed the original Troy Building.[3] LeatherCare began leasing a portion of the Troy Building in 1957.[4] In May 1965, Troy built an addition to the Troy Building, known as the Garage Addition Building,[5] and installed dry cleaning equipment there.[6] LeatherCare and Troy operated this equipment, which used a petroleum-based solvent called Stoddard Solvent, from 1965 until 1979.[7]

B. Installation of PCE Equipment in 1979.

In 1979, LeatherCare abandoned the use of Troy's dry cleaning equipment and the use of Stoddard Solvent as a cleaning solution and purchased dry cleaning equipment designed for use with PCE.[8] LeatherCare installed and exclusively used the PCE equipment in a separate portion of the Garage Addition Building.[9]

The PCE equipment that LeatherCare purchased in 1979 included five "reclaimers" and

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[3] *Id*. Exs. 2-4.
[4] *Id*. Ex. 1 at 13:14-18, 32:11-12.
[5] *Id*. Exs. 5-6.
[6] *Id*. Ex. 7; *see also id*. Ex. 1 at 118:22-120:14; *id*. Ex. 8.
[7] *Id*. Ex. 9 at RFA Nos. 2-6.
[8] *Id*. Ex. 10; *see also id*. Ex. 11 at 86:1-17, 87:8-13.
[9] *Id*. Ex. 11 at 91:5-93:4; *see also id*. Ex. 12; *id*. Ex. 1 at 87:1-5.

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one "sniffer" manufactured by Hoyt Manufacturing.[10] One year later in 1980 LeatherCare purchased one more reclaimer.[11] It also included two washing machines manufactured by Marvel Manufacturing, and at least one "still" of unknown manufacture.[12] The PCE dry cleaning equipment functioned much like an ordinary household washer and dryer.[13] An operator put garments into a washing machine, which cleaned the clothing with a PCE-based solvent manufactured by Dow Chemical.[14] After the wash cycle was complete, the clothes were transferred to another machine for drying.[15]

PCE was relatively expensive. A gallon of PCE cost approximately six to ten times as much as a gallon of Stoddard Solvent.[16] For this reason, standard practice was to attempt to collect used PCE and reclaim it for reuse. The system incorporated four methods to collect and reuse PCE:

- Washing machines extracted PCE from garments, then passed it through a series of filters to remove contaminants.[17]
- Reclaimers (i.e., dryers) vaporized PCE that remained in garments after extraction, and then used a condenser to return that vaporized PCE to liquid form.[18]
- A so-called "sniffer" captured the PCE vapors that escaped into the workspace or were exhausted from reclaimers by trapping these vapors in a carbon filter. The machine then applied steam to the filter to vaporize the trapped PCE, and finally re-condensed these vapors into liquid form.[19]
- A "still" was used to clean recaptured PCE by heating the solvent with steam until PCE vaporized, then re-condensing these vapors into liquid form.[20]

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[10] *Id.* Ex. 10 at ST-HOYT001191, ST-HOYT001176; *see also id.* Ex. 11 at 92:7-93:4.
[11] *Id.* Ex. 10 at ST-HOYT001184.
[12] *Id.* Ex. 11 at 92:7-93:4, 55:11-56:24.
[13] Declaration of Bruce E. Dale ("Dale Dec.") ¶ 4.
[14] Kray Dec. Ex. 1 at 54:9-11.
[15] *Id.* Ex. 11 at 95:11-25; *see also* Dale Dec. ¶ 5.
[16] Declaration of Peter M. Krasnoff ("Krasnoff Dec.") ¶ 4.
[17] Kray Dec. Ex. 11 at 118:17-22.
[18] Dale Dec. ¶ 6.
[19] *Id.*
[20] *Id.*

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The unrebutted factual and expert testimony in this case shows that LeatherCare disposed of approximately 2,000 gallons of waste PCE from its dry cleaning operation each year from 1979 to 1985, a total of approximately 12,000 gallons or 162,000 pounds of PCE over the years.[21] Some of the PCE waste went off-property, likely through the sewer.[22] However, a considerable portion was left in soil and groundwater beneath and migrating from the Property and was found there when the Property was remediated during redevelopment.[23]

LeatherCare disposed of PCE in three ways: (1) by disposing PCE-contaminated "muck" or "still bottoms" (from the still) in an uncovered and unlined truck that leaked to the ground; (2) by disposing PCE-contaminated spent filters (from the washers) into the same truck; and (3) by disposing PCE-contaminated wastewater (from the reclaimers, still and sniffer) into the sewer.[24]

C. Disposal of Still Bottoms ("Muck") and Filters to the Trash.

Still bottoms are the sludge-like residue that remains after PCE has been distilled.[25] Ritt has estimated that his company disposed of approximately 1,200 to 1,500 gallons of PCE in the form of still bottoms and spent filters each year.[26] In the late 1970s and early 1980s, still bottoms ("muck") typically contained 50% or more PCE.[27] The washing machines employed filters that required periodic replacement.[28] These spent filters were saturated with PCE.[29]

To dispose of the still bottoms, which could not be reused, LeatherCare threw them into an open truck used as a "dumpster." As Mr. Ritt explained:

> **Q.** Got it. Last thing. Let's go back to the term muck. What is muck?
> **A.** Muck is the residue that's left over from distilling the dirty solvent into a clean state, you end up with residue; whether it be soap, lint, what have you, ends up in the bottom of the still.
> **Q.** Okay.
> **A.** So you open a door and you scrape it out and you're done.
> **Q.** Is that also sometimes described as still bottoms?

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[21] *Id.* ¶ 12; *see also* Kray Dec. Ex. 11 at 172:25- 178:8; *id.* Ex. 13 at STC_0038399.
[22] Declaration of Peter D. Jewett ("Jewett Dec") ¶ 6.
[23] *Id.* ¶¶ 4-5.
[24] Dale Dec. ¶¶ 9-10; Krasnoff Dec. ¶ 5.
[25] Dale Dec. ¶ 10; Kray Dec. Ex. 11 at 116:15-20.
[26] Kray Dec. Ex. 13 at STC_0038399.
[27] Dale Dec. ¶ 10.
[28] Kray Dec. Ex. 11 at 166:2-12; *id.* Ex. 14 at 260:5-261:16.
[29] Dale Dec. ¶ 10; Kray Dec. Ex. 13 at STC_0038399.

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A. Okay.
Q. Have you heard that term?
A. Yeah.
Q. Does it mean the same thing?
A. I think it does.
Q. Okay. When you scrape it out of there, what do you do with it?
A. When we scrape it out, take it out and dump it in the Troy truck -- Troy --
Q. Dumpster?
A. -- dumpster. Thank you.
Q. Okay. So this is the dumpster that is back off of the loading dock area here.
A. Right.
Q. Okay.
A. And in those days it was highly acceptable.
Q. Okay.
A. Same thing with filters or everything else, just throw it in the dump.[30]

In fact, disposal of hazardous wastes in this manner, in the early 1980s, was not "highly acceptable" and was a primary cause of the contamination at the Site. This occurred because the dump truck was uncovered much of the time and the liquid PCE waste from the still bottoms and filters that LeatherCare threw in it leaked, particularly when it rained. PCE leaked onto the dirt or asphalt surrounding the loading dock, eventually finding its way to the soil and groundwater beneath the loading dock.[31] When PCE contamination was found at the Property in 2011, the highest concentrations were found beneath the loading dock, at levels of up to 10,000 times the cleanup standard promulgated by the Washington State Department of Ecology.[32]

D. Disposal of Liquid Hazardous Wastes.

Wastewater was generated from the "reclaimers" and the "sniffer." These machines recaptured PCE-containing vapors.[33] The wastewater they produced was contaminated with PCE, and was flushed down the drain that was connected to the sewer.[34] Mr. Ritt testified to the wastewater disposal as follows:

A. From a vapor standpoint, the perc that's on the clothes vaporizes, goes over the reclaimer, goes over the chillers, and converts it back to distilled perc.
…
Q. Okay. And then we've got wastewater coming off of those two units,

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[30] Kray Dec. Ex. 11 at 116:15-117:19.
[31] Krasnoff Dec. ¶ 8.
[32] Jewett Dec. ¶¶ 5-6.
[33] Dale Dec. ¶¶ 7-8.
[34] *Id.* ¶¶ 8-9.

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correct?
A. Correct.
Q. And where does the wastewater go? So the wastewater off of the condenser and the separator, where does that go?
A. So that comes off the separator, off the reclaimer, and that water is just poured down the --down the drain.
Q. Okay. Is it direct plumbed to the drain?
A. Direct plumbed.[35]

It is apparent from Mr. Ritt's testimony that he did not make any effort to understand and mitigate the large volumes of PCE that his company was dumping down the drain. For one thing, he never had the wastewater tested.[36] He testified that he believed the wastewater would have contained only a very small amount of PCE:

Q. So referring to the Fairview property operations from 1979 to 1985, it's your understanding that the wastewater would still have contained at least some PCE in it; correct?
A. Correct.
Q. Okay. And --
A. But like teaspoonfuls.
Q. Okay. And do you recall from 1979 to 1985 whether or not you had the wastewater tested at all?
A. Up to 1985?
Q. Yes.
A. We did not --
Q. Okay.
A. -- have it tested. There was no need in those days. Whatever you had, you threw it out in the backyard. It was just fine.[37]
…
A: You take the bucket and pour it down the drain; it's distilled water at this point. And we're done.[38]

The unrebutted testimony of the Times' expert is that the wastewater LeatherCare discharged annually contained from 400 to 1,200 gallons of PCE, an amount that was dumped down the sewer each year.[39]

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[35] Kray Dec. Ex. 11 at 109:15-18, 110:5-15.
[36] *Id.* Ex. 14 at 248:14-18.
[37] *Id.* Ex. 14 at 248:7-22.
[38] *Id.* Ex. 11 at 110:23-25.
[39] Dale Dec. ¶¶ 8-9.

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IV. ARGUMENT AND AUTHORITY

A. Legal Standard for Reviewing Summary Judgment Motions.

A party claiming relief may move, with or without supporting declarations, for summary judgment on all or part of the claim. FRCP 56(a). Summary judgment should be rendered where the pleadings, discovery, and materials in the record show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* FRCP 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.").

Summary judgment is a particularly beneficial tool for resolving issues of liability in CERCLA cases, because it provides an "efficient" means of "narrowing the issues at each phase" and "potentially hastening remedial action or settlement discussions once liability is determined." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989); *see also Basic Mgmt. Inc. v. United States*, 569 F. Supp. 2d 1106, 1114 (D. Nev. 2008); *Moore's Federal Practice Manual for Complex Litigation (Fourth)* § 34.26 at 671 (Federal Judicial Center 2004) ("Summary judgment is a particularly effective tool for eliminating tenuous claims and defenses in CERCLA cases.").

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. If the moving party shows there is no genuine issue for trial, the inquiry shifts to the party opposing summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Standard for Establishing Liability of a "Person" under CERCLA.

"CERCLA imposes the costs of the cleanup on those responsible for the contamination." *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (internal quotations and citations omitted). The Ninth Circuit has construed CERCLA to effectuate the statute's two primary goals: "(1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc) (internal quotation and citations omitted).

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CERCLA sets out four classes of "potentially responsible parties" ("PRPs"), subject to narrow defenses not applicable here.[40] Mr. Ritt qualifies as a PRP under two of these categories:

1. **Former Operator**: "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"; 42 U.S.C. 9607(a)(2) (emphasis added);

2. **Arranger**: "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing . . . hazardous substances . . . ." *Id.* § 9607(a)(3) (emphasis added).

The term "person" includes "an individual." *Id.* § 9601(21). A "facility" includes any "building, structure, installation, equipment, pipe or pipeline," etc., *id.* § 9601(9), meaning that a "person" who "operated" any building or equipment that discharged hazardous substances is liable under the statute.

Certain terms in the liability section of CERCLA are not defined (for example, "arranged for disposal"). An "operator" is defined circularly as "any person . . . operating" a facility. *Id.* § 9601(20)(A)(ii). Establishing that Mr. Ritt is a "person" to whom liability attaches under 42 U.S.C. § 9607(a)(2) and/or § 9607(a)(3) requires reading the words of the statute in the context of an individual, with the aid of the prevailing case law.

C. Standard for Individual Operator Liability Under CERCLA.

The United States Supreme Court has explained that an "operator" under CERCLA is "simply someone who directs the workings of, manages, or conducts the affairs of a facility." *Bestfoods*, 524 U.S. at 66. Corporate owners and/or officers like Mr. Ritt are liable under CERCLA if they "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67.

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[40] Mr. Ritt has not raised any of the affirmative defenses set out in 42 U.S.C. § 9607(b). *See* Dkt. 24.

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The Ninth Circuit has taken an "expansive" view of operator liability, holding that it attaches to any person with the "authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 452 n.9 (9th Cir. 2011) (quoting *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir.1992)). Here, the facts admitted by Mr. Ritt make that showing irrefutable.

1. **Mr. Ritt Directed, Managed, and Controlled the Affairs of the LeatherCare Facility.**

Mr. Ritt became LeatherCare's president no later than 1961.[41] As longtime LeatherCare employee Martin Brown put it, during the time LeatherCare leased the Property: "Steve? He just -- he was the boss. Don't know how else to describe it."[42]

Mr. Ritt controlled all aspects of LeatherCare's operation. As one of his employees, Lawrence Rowley, testified:

> **Q.** On a day-to-day basis who directed your activities at LeatherCare?
> **A.** Primarily, Steve.[43]

Similarly, the delivery truck driver for LeatherCare, Mr. Brown, testified:

> **A.** Steve was running the day-to-day operation. [His father, Al] Ritt was starting to step back and let Steve do more and more.[44]

Mr. Ritt himself corroborated his active role in running the LeatherCare operation:

> **Q.** Who handled day-to-day operations for the company while it was operating at the Troy block?
> **A.** Who managed it?
> **Q.** Correct.
> **A.** I managed it.[45]

This meant spending much of his time on the production floor, personally overseeing operations in which LeatherCare employees used PCE:

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[41] Kray Dec. Ex. 15 at LC 02646.
[42] *Id.* Ex. 16 at 90:19-24.
[43] *Id.* Ex. 17 at 15:8-10.
[44] *Id.* Ex. 16 at 82:3-9.
[45] *Id.* Ex. 1 at 44:22-45:1; *see also id.* Ex. 18 at 15:16-17 ("Steve was pretty much the person that oversaw everything."), 67:16-18 ("Q. Who did day-to-day management of the production area? A. Ray and Steve. Ray Powers and Steve Ritt.").

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> **Q.** What was your personal role with production while LeatherCare operated the Troy block?
> **A.** Acted as a manager in running the production facility.
> **Q.** On a typical day, where would you be physically located?
> **A.** Everywhere.[46]

If employees had questions or if Mr. Ritt found fault in their work, "he would do it or show [them] how to do it or tell [them] how to do it."[47]

2. Mr. Ritt Directed, Oversaw, and Managed the Waste Disposal.

Mr. Ritt's day-to-day management, as his deposition testimony establishes, extended to "operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods,* 524 U.S. at 66.

Mr. Ritt made the decision, in 1979, to move away from a petroleum-based dry cleaning system and purchase equipment which used PCE. As he testified:

> I toured one plant after another [across the country] to make sure that our installation was going to be top notch. […] I belong to an association […] of guys that are specializing in leather and suede cleaning. And I just picked up the -- pick up a plane, and went and knocked off about five of them, checking how they -- how they installed various pieces of equipment.[48]

Mr. Ritt personally purchased LeatherCare's new dry cleaning equipment.[49] When asked what role he played in the purchase of this equipment, he responded simply "100 percent."[50]

Mr. Ritt personally directed the installation of the new PCE equipment, including the decision to pipe PCE-laden wastewater from the separator to the sewer:

> **Q.** What was the process you used for selecting this equipment and purchasing it?
> **A.** Toured the country, looked at installations, made decisions on the basis of how this would fit into our operation. Made the decision to purchase, installed them, done.
> **Q.** What role did [the equipment manufacturer] have in the installation of the

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[46] *Id*. Ex. 1 at 45:25-46:4; *see also id.* Ex. 16 at 82:7 ("Steve was running the day-to-day operation.").
[47] *Id*. Ex. 17 at 24:25-25:8.
[48] *Id*. Ex. 11 at 68:13-69:11.
[49] *Id*. Ex. 11 at 68:15-69:11; *see also id.* Ex. 17 at 24:14-18 ("Q. Who would make decisions about what equipment to purchase for LeatherCare? A. Steve. Q. Steven Ritt? A. Steve Ritt, yes."); *id.* Ex. 18 at 69:19-21 ("Q. Who would have made decisions about purchasing the machines used to clean the clothes? A. It would be Steve Ritt, I believe.").
[50] *Id*. Ex. 1 at 58:12-14.

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equipment?
A. None.
Q. So they provided you with the equipment and install was up to you?
A. Correct.[51]

Mr. Ritt decided against following manufacturers' installation instructions, choosing instead to rely on his own knowledge:

Q. Would LeatherCare have used this [Hoyt equipment instruction] manual for purposes of installing the Hoyt machine?
A. No.
Q. And why not?
A. Because we've been in the industry long enough to know what it takes to install a piece of steam pipe in and steam pipe out. Pretty straightforward. Nothing difficult at all.[52]

He also called in parts orders,[53] provided all training for operating the equipment,[54] and at times operated the PCE dry cleaning equipment himself:

Q. Would you ever have had occasion to operate the still [used to reclaim used PCE]?
A. Yes.
Q. When?
A. When would I have the opportunity?
Q. When would you have operated the still?
A. Because I own the business and have employees who were monitoring equipment, and what have you, and I'd oversee their performance.[55]

Mr. Ritt estimated his company generated 1,200 to 1,500 gallons of PCE waste in the form of filter cartridges and still bottoms each year.[56] He knew his company dumped this waste in or around a truck in the loading dock area, that this truck was left uncovered and exposed to the elements, and that it leaked:

Q. Okay. Explain that to me. Did you see rain water dripping on the outside of the dumpster or see it dripping from the dumpster, meaning from the inside of the dumpster?
A. I'd say it came from inside the dumpster. The dumpster at this point was called the -- is a truck where they took waste materials, broken chairs, filters,

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[51] *Id*. Ex. 1 at 65:11-21; *see also id.* Ex. 11 at 107:15-23.
[52] *Id*. Ex. 11 at 123:17-24; *see also id.* Ex. 14 at 250:12-17.
[53] *Id*. Ex. 11 at 138:13-16.
[54] *Id*. Ex. 1 at 100:4-17
[55] *Id*. Ex. 11 at 107:6-14; *see also id.* Ex. 17 at 24:19-24, 64:3-8, 24:4-8; *id.* Ex. 11 at 184:22-185:18; *id.* Ex. 14 at 311:24-312:3.
[56] *Id*. Ex. 13 at STC_0038399.

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whatever. Just a dump truck. So it opened at the top. So if it rained, rain would go into the collection area where the -- where all the junk was dumped, and end of story. So where the water dripped, whether it was rain water or some other dirty material coming off of something they've thrown away, I don't know.
Q. Was the dumpster in your recollection always open or was it closed at some point, sometimes?
A. Closed when they did the hauling away.
Q. Other than it was left open?
A. Yeah.
Q. And you said it was a truck, it was just a dump truck that --
A. Yeah.
Q. -- was backed up?
A. Dump truck, yeah.[57]

Mr. Ritt was also aware that his company discharged wastewater into the sewer[58] and that the wastewater contained PCE, even if he may not have appreciated how much.

Q. And where does the wastewater [from the Hoyt Solvo-Miser] go? . . . .
A. So that comes off the separator, off the reclaimer, and that water is just poured down the - - down the drain . . . .
. . .
Q. Okay.
A. You take the bucket and pour it down the drain; it's distilled water at this point. And we're done . . .
. . .
Q. Where -- where did the wastewater from the [Hoyt Sniff-O-Miser] go?
A. Down the sewer.
Q. Directly?
A. Directly."[59]
…
Q. Did you understand, at any time from 1979 to 1985, that the wastewater portion of that would still have at least some part PCE in it?
A. Impossible to get to a hundred percent.
Q. Ok, so the answer would be yes, you did - -
A. Yes.[60]

In summary, the undisputed facts show that Mr. Ritt controlled LeatherCare's operations and was aware of and directed the disposal of hazardous wastes into the trash and the sewer.

3. Mr. Ritt's Actions are Analogous to Cases Holding Individuals Liable as Operators.

Ritt's actions place this matter within the mainstream cases in which corporate officers and

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[57] *Id*. Ex. 14 at 258:24-260:2.
[58] *Id*. Ex. 11 at 102:21-105:14, 110:8-113:7.
[59] *Id*. Ex. 11 at 110:8-115:19.
[60] *Id*. Ex. 14 at 247:4-10.

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managers have been held liable as CERCLA "operators." For example, *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), involved a contaminated former landfill. A former operator of that landfill alleged that the president and principal shareholder of different companies that also operated the landfill, Mr. Ter Maat, was liable in his personal capacity as a CERCLA "operator." *Id.* at 954. Writing for the Seventh Circuit, Judge Posner first addressed the "relatively simple" question of whether Mr. Ter Maat could "shield himself from liability for operating a hazardous-waste facility merely by being an officer or shareholder of a corporation that also operates the facility." *Id.* at 955. "The answer is no," the court held:

> If Ter Maat did not merely direct the general operations of [his companies] or specific operations unrelated to pollution, but supervised the day-to-day operations of the landfill—for example, negotiating waste-dumping contracts with the owners of the wastes or directing where the wastes were to be dumped or designing or directing measures for preventing toxic substances in the wastes from leeching into the ground and thence into the groundwater—then he would be deemed the operator, jointly with his companies, of the site itself.

Id. at 955-56 (internal citations omitted). On remand, the district court found that Mr. Ter Maat had exercised sufficient supervision over the landfill to be an operator for CERCLA purposes. *Browning-Ferris Indus. of Illinois, Inc. v. Ter Maat*, No. 92 C 20259, 2000 WL 1716330, at *1-2 (N.D. Ill. Nov. 8, 2000), *aff'd*, 11 F. App'x 626 (7th Cir. 2001). The court noted, for example, that Mr. Ter Maat was "a key figure in the set up of site operations," had been "directly involved in pollution control measures," and had personally observed the hazardous waste streams disposed of at his company's landfill. *Id.* at *2. Mr. Ritt's control over LeatherCare's pollution-causing operations is at a minimum comparable to that of Mr. Ter Maat.

The court in *Allied Waste Transp., Inc. v. John Sexton Sand & Gravel Corp.*, No. 13 C 1029, 2016 WL 3443897, at *14 (N.D. Ill. June 23, 2016), explained that *Ter Maat* illustrates only that "*one way* to be an operator [i]s to supervise the 'day-to-day operations of the [facility.]'" The case of *State of Cal. on Behalf of California Dep't of Toxic Substances Control v. Celtor Chem. Corp.*, 901 F. Supp. 1481 (N.D. Cal. 1995) is also instructive. That case involved hazardous substance contamination at the "Celtor" site, where the Celtor Chemical Corporation had operated

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an ore-processing plant for approximately three years. *Id*. at 1484. The State of California brought suit under CERCLA against Celtor and its president, Dr. Celestre, seeking to recover cleanup costs. *Id*. Dr. Celestre was Celtor's president and sat on its Board of Directors during all relevant periods. *Id*. He visited the Celtor site, which was supervised by engineers, only about once every other month. *Id*. Dr. Celestre moved for summary judgment, asserting that he was not a CERCLA operator. The court denied his motion, finding that "it is quite possible that Dr. Celestre had the authority to hire and fire employees at the Celtor facilities and to implement practices at the facilities to control the pollution," and that based on this evidence "a reasonable juror could find that Dr. Celestre had the authority to control the day-to-day operations at the Celtor facilities." *Id*. at 1487. Ritt had (and exercised) such authority, and more.

Numerous other cases have reached the same conclusion. *See State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1038, 1052 (2d Cir. 1985) (officer and shareholder who "made, directed, and controlled" all corporate decisions, and was personally aware of hazardous waste practices at site held liable); *City of Wichita, Kansas v. Trustees of APCO Oil Corp. Liquidating Trust*, 306 F. Supp. 2d 1040, 1055-56 (D. Kan. 2003) (officer who made environmental compliance decisions held liable as operator); *United States v. Meyer*, 120 F. Supp. 2d 635 (W.D. Mich. 1999) (officer and shareholder held liable as operator where he supervised and assisted in construction of sewer line which leaked hazardous substances and was aware that such leaking would occur); *Int'l Clinical Labs. Inc. v. Stevens*, No. CV 87-3472, 1990 WL 43971, at *1, *4 (E.D.N.Y. Jan. 11, 1990) (president and principal shareholder with "overall responsibility for the management" of polluting company held liable as operator).

Conversely, Mr. Ritt's authority over and direct involvement in LeatherCare's PCE-related operations place the instant matter in stark contrast to those cases where courts declined to find individual CERCLA liability. *See, e.g., Riverside Mkt. Dev. Corp. v. Int'l Bldg. Products, Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (no operator liability where plaintiff failed to present "any evidence showing that [officer] personally participated in any conduct that violated CERCLA" and where evidence showed that officer "spent very little time at the [site]," visiting it only "two to

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four times a year"); *City of Wichita*, 306 F. Supp. 2d at 1055-56 (no operator liability where company president was "two layers removed from the day-to-day supervision of operations").

D. Mr. Ritt Qualifies as an "Arranger for Disposal" Under CERCLA.

Although unnecessary to establish his liability under CERCLA, it is also indisputable that Mr. Ritt is liable as an "arranger," because he is a "person" who "by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(3).

The United States Supreme Court has interpreted the phrase "arranged for disposal" to mean someone who "takes intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 611 (2009). In other words, a person is an arranger if he has "direct involvement in arrangements for the disposal of waste." *U.S. v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002); *see also United States v. NCR Corp.*, No. 10-C-910, 2012 WL 5893489, *4 (E.D. Wis. Nov. 23, 2012) (holding that an "arranger" need not know that the substances he arranges to dispose are hazardous; it is the intent to dispose that matters).

Courts in the Ninth Circuit have distilled arranger liability as requiring a party to either: (1) have the authority to control and to exercise some actual control over the disposal of waste; or (2) own or possess waste and arrange for its disposal. *Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d at 1094, 1132 (D. Idaho 2003); *see also Nu-West Mining Inc. v. United States*, 768 F. Supp. 2d 1082, 1088 (D. Idaho 2011); *Basic Mgmt. Inc.*, 569 F. Supp. 2d at 1116.[61] Mr. Ritt's actions satisfy both limbs of the liability tree.[62]

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[61] The "control" aspects of cases pre-dating the Supreme Court's 2009 *Burlington Northern* decision, which shifted the focus of "arranger" liability to "intent to dispose," remain relevant for a case like this, where Mr. Ritt's intent to dispose of *waste*water and spent filters and muck—none of which could be reused—from his company is apparent from his testimony. *See supra* pp. 5-7, 10-13.

[62] An individual corporate officer or director is liable as an arranger "if he or she had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances." *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995). Liability turns on a party's control over the company's waste disposal decisions. *See, e.g.*, *id.* at 1090 (Shareholder was an arranger because his "actions inexorably led to the continuation of the disposal of [subsidiary's] wastes at the

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Ritt must be considered an arranger for substantially the same reasons he is liable as a former operator: he had and exercised total control over all aspects of his company's operations, including those specifically related to the use and disposal of PCE.[63] *See, e.g.*, *Basic Mgmt. Inc.*, 569 F. Supp. 2d at 1116-17 (finding defendant liable as both operator and arranger based on "the same facts"). Ritt's possession and exercise of control over the method and manner of his company's waste disposal is the very essence of arranger liability.

As before, Ritt's actions place this matter well within the mainstream of the case law imposing arranger liability on an individual, including corporate officers and managers. Indeed, courts have imposed arranger liability on corporate officers that exercised far less control over their companies' waste disposal practices than did Ritt. For example, in *TIC Investment Corp.*, 68 F.3d 1082, defendant Georgoulis was the president and chairman of TIC, which in turn owned WFE, a farm implement manufacturer. Prior to TIC purchasing WFE, WFE had contracted with a third party to dispose of its hazardous wastes. *Id*. Georgoulis was not aware of this waste disposal contract, had no personal knowledge of the dump site, and was not "in any way directly involved in waste disposal matters." *Id*. at 1084. He did, however, have and exercise the authority to control important aspects of WFE's operations, such as often visiting WFE's corporate offices, speaking with its officers on a daily basis, participating in personnel matters such as union contract negotiations, and having final say over staffing decisions. *Id*. at 1084-85. He was also one of two WFE board members, meaning that the board could not take action without his approval. *Id*. at 1085. And his control of WFE's budget was such that "he left WFE employees no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and [the third party waste hauler]." *Id*. at 1090. In other words, Georgoulis had not "truly

dumpsite."); *United States v. Bliss*, 667 F. Supp. 1298, 1306 (E.D. Mo. 1987) (summary judgment granted on arranger liability where plant supervisor and chief executive officers had "ultimate authority for decisions regarding disposal"); *Shell*, 294 F.3d at 1055 ("[C]ontrol is a crucial element of the determination of whether a party is an arranger under § 9607(a)(3)."); *United States v. Ne Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 743-44 (8th Cir. 1986) (holding that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme," and finding liable a plant supervisor who "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal" of company's hazardous waste).

[63] *See supra*, pp. 5-7, 10-13.

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delegated authority to others and allowed those individuals to exercise their judgment with respect to WFE's waste disposal practices without his interference." *Id.* For the Eighth Circuit, this was sufficient to impose individual arranger liability on Mr. Georgoulis. *Id.* at 1090-91. If Mr. Georgoulis was an arranger, so too is Mr. Ritt.

E. Mr. Ritt is Liable as an Operator and an Arranger Under MTCA.

Like CERCLA, MTCA establishes four classes of liability, but the standard of liability is even broader than under CERCLA. With the same limited exceptions as CERCLA, which are not applicable here, MTCA establishes the following categories of liability for "persons" relevant to this motion:

1. **Former Operator**: "Any person who owned or operated the facility at the time of disposal or release of the hazardous substances"; RCW 70.105D.040(1)(b);

2. **Arranger**: "Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility." RCW 70.105D.040(1)(c).

Under MTCA, an "operator" is "any person . . . who exercises *any* control over the facility." RCW 70.105D.020(22). Under MTCA's plain text, the threshold for finding an individual liable is even lower than it is under CERCLA. For "operator" liability to attach, the individual need only operate a facility "at the time of the disposal or release" of a hazardous substance. And for an individual like Mr. Ritt to have operated a facility, he need only exercise "any" control over that facility.

Based on the factual evidence already deduced with regard to operator liability under CERCLA, Mr. Ritt undisputedly "operated" LeatherCare (in the sense of exercising overall day-to-day control) "at the time of the disposal or release" of PCE. While managing the operation, Mr. Ritt undisputedly "arranged for disposal" of PCE.

Generally, courts interpreting MTCA have followed CERCLA case law when the language in MTCA tracks the language in CERCLA. *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423,

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427 (1992) (stating that Washington courts look to CERCLA cases, because MTCA "was heavily patterned after" CERCLA). However, the scope of liability as an "operator" and as an "arranger" is broader under MTCA.

1. Mr. Ritt is Liable as an Operator Under MTCA, Because he Exercised "Any" Control Over the LeatherCare Facility.

As the Washington Court of Appeals recently explained, MTCA's scope of "operator liability" sweeps more broadly than its federal counterpart:

> However, although MTCA was modeled after CERCLA, the applicable provision here—namely, the definition of an "owner or operator"—is different. CERCLA defines "owner or operator," in relevant part, as "any person who owned, operated, or otherwise *controlled activities at such facility immediately beforehand*." 42 U.S.C. § 9601(20)(A) (emphasis added). MTCA defines "owner or operator" as "[a]ny person with any ownership interest in the facility or who exercises *any control over the facility*." RCW 70.105D.020(22).

Pope Res., LP v. Washington State Dep't of Nat. Res., 197 Wn. App. 409, 422 (2016). As a result, the court explained, under MTCA an operator need not exercise "*actual control* over the *polluting activity*," but instead only "*any control* over the facility." *Id*. at 423 (emphasis in original).

Under this standard, Mr. Ritt need only have had "any control" over the LeatherCare facility to be liable under MTCA, *id.*, without regard to whether he had control over "operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 67. As described above, Mr. Ritt had and exercised sufficient control over his business to meet this standard.

2. Mr. Ritt is Liable as an "Arranger" Under MTCA.

Washington courts historically held that "MTCA follows CERCLA's interpretation of 'arranger'" liability. *City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1229 (E.D. Wash. 2006) (citing *Seattle City Light v. Washington State Dept. of Transp.*, 98 Wn. App. 165, 172 (1999)). However, Washington courts declined to follow the United States Supreme Court's 2009 *Burlington Northern* decision that grafted the "intent" requirement onto "arranger" liability under

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CERCLA:

> Although *Burlington Northern* requires an intent element for "arranger" liability under 42 U.S.C.A. § 9607, our state courts have interpreted "arranger" liability under the state MTCA not to require this element. The United States Supreme Court's interpretation of CERCLA does not trump our state courts' interpretation of Washington's comparable Act. . . . MTCA's "arranger" liability provision does not require a plaintiff to prove that the defendant had the specific intent to dispose of a hazardous substance.

PacifiCorp Envtl. Remediation Co. v. Washington State Dep't of Transp., 162 Wn. App. 627, 663 (2011) (citations and quotations omitted). Under MTCA, as Washington courts have observed, one can "arrange for disposal" even "without knowing what will happen to the stuff, or even while hoping that it ends up in the best of all possible spots, or while insisting that proper practices be rigorously followed." *Seattle City Light.*, 98 Wn. App. at 172-73 (citation and quotation omitted); *see also Modern Sewer Corp. v. Nelson Distrib., Inc.*, 125 Wn. App. 564, 573 (2005) (defendant liable as "arranger" for "disposing" gasoline into monitoring well, where defendant mistakenly placed gasoline into well instead of customer's storage tank).

The undisputed facts from Mr. Ritt's own testimony, and that of his employees, show that Mr. Ritt had the authority to control and actually did exercise control over the disposal of the waste at his company's facility, regardless of his subjective intent. Mr. Ritt was "the boss," in "100 percent" control of the LeatherCare facility, selected the PCE equipment, directed plumbing the equipment to the sewer instead of as indicated in the manufacturing instructions, and directed the disposal of muck and filters into an uncovered truck that leaked to the ground.[64] Mr. Ritt is liable as an "arranger" under MTCA.

CONCLUSION

LeatherCare acknowledges that its operations contaminated the Property with the hazardous substance PCE, and that it is liable under CERCLA and MTCA for remediating that contamination. Mr. Ritt's unquestioned control over and participation in all aspects of LeatherCare's operations likewise make him liable under those statutes. The Times therefore

[64] *See supra* pp 5-7, 10-13.

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respectfully requests that the Court grant the instant motion and find Mr. Ritt individually liable under CERCLA and MTCA as a former operator and as a person who arranged for the disposal of a hazardous substance.

DATED June 21, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury and the laws of the United States of America that the foregoing is true and correct.

DATED June 21, 2017.

s/ Jeff B. Kray
Jeff B. Kray

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